A

RE KHONDKER YARAD AHMED; EX P MIDF AMANAH VENTURES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[BANKRUPTCY NO: 29NCC-4219-08-2014]
B 13 JANUARY 2016

BANKRUPTCY: *Notice – Judgment in default – Judgment creditor ('JC') obtained judgment in default of appearance against judgment debtor ('JD') – Judgment sum based on guarantee executed by JD for JC regarding debts owed by company to JC* C *– Proposed scheme to compromise company's debts – JC was creditor of company in compromise scheme and applied for bankruptcy notice against JD – Whether bankruptcy notice was abuse of court process and should be set aside – Whether JD had counterclaim against JC – Whether compromise scheme approved by another High Court could extinguish judgment debt of JD – Companies Act 1965, s. 176(1)*

D

The judgment creditor ('JC') obtained a judgment in default of appearance against the judgment debtor ('JD') for a sum of RM500,000 ('the judgment sum'), which was based on a guarantee executed by the latter for the former regarding the debts owed by Bostonweb Academy Sdn Bhd ('the company') to the JC. The company then filed a suit pursuant to s. 176 of the Companies E Act 1965 ('CA') ('s. 176 CA suit'), proposing a scheme to compromise the company's debts owed to the company's creditors ('compromise scheme'). The JC was a creditor of the company in the compromise scheme ('scheme creditor'). The High Court approved the compromise scheme. The JC proceeded to apply for the issuance of a bankruptcy notice ('BN') against the F JD. The JD filed an affidavit to set aside the BN, alleging that (i) the judgment sum was based on a guarantee in respect of the company's debts due to the JC; (ii) upon approval of the compromise scheme, the JD's debt due to the JC did not exceed RM7,000 and as such, the JD had a counterclaim of RM484,101 against the JC ('alleged counterclaim') and G therefore, the BN should be set aside; and (iii) the JC had earlier filed a creditor's petition ('CP') against the JD at the High Court which had been set aside ('the first bankruptcy order') and since the JC had not appealed against that decision, the first bankruptcy order was final and the BN was an abuse of court process and should be set aside. The Senior Assistant Registrar H ('SAR') dismissed the JD's application on the grounds that (i) there was no alleged counterclaim under the Bankruptcy Act 1967 ('BA'); (ii) the alleged counterclaim was a mere afterthought by the JD; and (iii) under s. 176 of the CA, the compromise scheme only bound the company and not the JC. Hence, the present appeal. The issue that arose for the court's determination was whether the compromise scheme for the company's debts under s. 176(1) I of the CA, which had been approved by another High Court under s. 176(4) of the CA, could extinguish a judgment debt of the JD.

Held (dismissing appeal with costs):

(1) The alleged counterclaim relied on the compromise scheme had court approval. The alleged counterclaim did not constitute a counterclaim within the meaning of s. 3(1)(i) of the BA and Form 7 of the Bankruptcy Rules 1969 ('BR') because the JD had no claim against the JC which must be in a liquidated sum or a money demand which was ascertainable with certainty as between the same parties and in the same right, as in ordinary actions. Since the alleged counterclaim was not a counterclaim, the JD's affidavit could not set aside the BN. (paras 24 & 25)

(2) The JD had been served with the BN on 19 September 2014. The BN gave the JD seven days to pay the judgment sum. The JD had not adduced any evidence that he had given any notice to the JC within seven days that he disputed the validity of the BN on the ground of the alleged counterclaim or on any other ground. Proviso (ii) to s. 3(2) of the BA provides that if the JD did not give notice to the JC within seven days that the JD disputes the validity of the BN, the BN shall not be invalidated. (para 27)

(3) If all conditions of an approved scheme which has expressly provided for a third party arrangement are fulfilled by a company, the company may enforce third party arrangements against the creditor as statutory contract. The JD could not enforce the compromise scheme against the JC. No evidence had been adduced by the JD that the compromise scheme had expressly included a provision for the JD's judgment sum to be extinguished. In fact, the JD failed to exhibit the compromise scheme in his affidavit. (paras 41 & 42)

(4) There was no evidence that after the compromise scheme had been approved by the creditors and the High Court, the company had fulfilled all the terms and conditions of the approved compromise scheme. Even if the compromise scheme expressly provided for the extinguishment of the judgment sum and assuming the company had satisfied all the terms and conditions of the approved compromise scheme, only the company, and not the JD, could enforce the approved compromise scheme against the JC as a statutory contract. (para 42)

Case(s) referred to:

Chief Commissioner of Pay-Roll Tax v. Group Four Industries Pty Ltd (1984) 8 ACLR 973 ***(refd)***

Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd [2001] 4 SLR 35 ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Costruction Sdn Bhd [2007] 6 CLJ 613 CA ***(refd)***

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Development & Commercial Bank Bhd v. Datuk Ong Kian Seng @ Ong Kin Cheang [1995] 3 CLJ 307 FC ***(refd)***

Ghazali Hj Ibrahim v. CIMB Bank Bhd [2012] 9 MLJ 768 ***(refd)***

Hoban Steven Maurice Dixon & Anor v. Scanlon Graeme John & Ors [2007] 2 SLR 770 ***(refd)***
Malayan Banking Bhd v. Datuk Lim Kheng Kim [1] [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826 HC ***(refd)***
Malayan Banking Bhd v. Datuk Lim Kheng Kim [2] [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840 HC ***(refd)***
MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 CA ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [2000] 1 CLJ 503 CA ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***
Ratna Ammal v. Tan Chow Soo [1970] 1 LNS 131 FC ***(refd)***
Re David Lim Hong Kee; Ex p Perwira Habib Bank Malaysia Bhd [1995] 4 CLJ 627 HC ***(refd)***
Re Tunku Maryam Tunku Zainal Abidin; Ex p Arab Malaysian Finance Bhd [2007] 8 CLJ 626 ***(refd)***
Re Wong Pong Yap; Ex p Development & Commercial Bank Bhd [2002] 1 LNS 256 HC ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***
Texfibre (Selangor) Sdn Bhd & Ors v. Permata Merchant Bank Bhd [1996] 1 LNS 366 HC ***(refd)***
Vasanthi Rajamanikam v. Kalaiselvi Perumal [2012] 9 CLJ 912 CA ***(refd)***
Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)
Bankruptcy Rules 1969, rr. 18(1), 95(1), (2)
Companies Act 1965, s. 176(1), (3), (4), (10F), (10G)

Companies Act (Chapter 50) (Sing), ss. 210(1), (3AA), (4)

For the appellant/judgment debtor - Cheong Sek Kwan; M/s SK Cheong
For the respondent/judgment creditor - Jagjit Kaur Ujagar Singh; M/s Sidek Teoh Wong & Dennis

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong JC:

Novel Issue

[1] This appeal to the High Court (HC) Judge against a decision of the learned Senior Assistant Registrar (SAR) of the HC's Bankruptcy Division (this appeal), raises a novel question of whether a scheme of compromise of a company's debts under s. 176(1) of the Companies Act 1965 (CA) which has been approved by another HC Judge under s. 176(4) CA, can extinguish a judgment debt of a third party guarantor (who has guaranteed the company's debts) due to a judgment creditor who is a creditor in the scheme and has unsuccessfully opposed the scheme.

Proceedings

[2] In this appeal, the appellant (JD) is a citizen of the People's Republic of Bangladesh while the respondent company is a judgment creditor of the appellant (JC).

[3] In Kuala Lumpur HC Civil Suit No. 22NCC-100-2010, on 4 March 2010, the JC obtained a judgment in default of appearance against the JD for a sum of RM500,000 with interest and costs (judgment sum). The judgment sum was based on a guarantee dated 27 July 2009 executed by the JD in favour of the JC (guarantee) regarding the debts owed by Bostonweb Academy Sdn Bhd (company) to the JC.

[4] In December 2012, the company filed Originating Summons No. 24 NCC-432-12-2012 in the Kuala Lumpur HC (s. 176 CA Suit) and proposed under s. 176(1) CA a scheme to compromise the company's debts owed to the company's creditors (compromise scheme). The JC is a creditor of the company in the compromise scheme (scheme creditor).

[5] According to the compromise scheme, the scheme creditors would be paid RM0.01 for every RM5 owed by the company to the scheme creditors.

[6] In the s. 176 CA suit, on 7 December 2012, the Kuala Lumpur HC ordered a meeting of the scheme creditors under s. 176(1) CA (scheme creditors meeting).

[7] On 4 March 2012, the scheme creditors meeting was held and a majority of the scheme creditors representing three-fourths in value of the scheme creditors as required by s 176(3) CA, had been obtained for the compromise scheme (scheme creditors' agreement). The JC was represented by a proxy, Mr Foo Wei Hoong (Mr Foo), at the scheme creditors meeting who voted unsuccessfully against the compromise scheme.

[8] Based on the scheme creditors' agreement, the Kuala Lumpur HC approved the compromise scheme on 4 March 2012 under s. 176(4) CA (court approval).

[9] On 14 August 2014, the JC applied to the Kuala Lumpur HC (bankruptcy division) for the issuance of a bankruptcy notice (BN) against the JD based on the judgment sum.

[10] Upon service of the BN on the JD, The JD filed an affidavit affirmed by the JD on 25 September 2014 (JD's affidavit). The JD's affidavit alleged, among others, as follows:

(a) the judgment sum was based on the guarantee in respect of the company's debts due to the JC;

(b) upon court approval for the compromise scheme (RM0.01 for every RM5 of debt due by the company to the scheme creditors), the JD's debt due to the JC did not exceed RM7,000. As such, the JD had a counterclaim of RM484,101 against the JC (alleged counterclaim) and on this ground alone, the BN should be set aside; and

(c) the JC had earlier filed a creditor's petition (CP) against the JD in Kuala Lumpur HC Bankruptcy No. 29-353-01-2013 (first bankruptcy case). In the first bankruptcy case, the CP had been set aside by Hanipah bt Farikullah J on 8 July 2014 (first bankruptcy order). The JC did not appeal to the Court of Appeal against the first bankruptcy order. Accordingly, the first bankruptcy order is final and the BN in this case therefore constituted an abuse of court process and should be set aside.

[11] Mr Foo affirmed an affidavit on behalf of the JC to reply to the JD's affidavit (JC's affidavit). According to the JC's affidavit, among others:

(a) the JD should have filed a summons in chambers (SIC) to set aside the BN and not merely filed the JD's affidavit;

(b) the JC denied the alleged counterclaim;

(c) the compromise scheme concerned only the company and did not bind the JC as against the JD under s. 176 CA. The company is a legal entity which is separate from the JD. The JD is still liable to the JD under the judgment sum. According to the guarantee, among others, the JD agreed to be liable to the JC as a principal debtor; and

(d) the first bankruptcy order was due to a defective CP. The merits of the CP had not been decided in the first bankruptcy case. Consequently, the JC could file a second BN in this case which was not defective.

[12] The JD did not reply to the JC's affidavit.

[13] On 15 June 2015, the learned SAR dismissed the JD's application to set aside the BN without any order as to costs (SAR's decision). The reasons given in the SAR's decision are as follows:

(a) there is no alleged counterclaim under the Bankruptcy Act 1967 (BA);

(b) the alleged counterclaim was a mere afterthought by the JD;

(c) under s. 176 CA, the compromise scheme only bound the company and not the JC; and

(d) reliance had been placed by the learned SAR on the Court of Appeal case of *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2007] 6 CLJ 613.

[14] This Appeal (court enclosure No. 9) had been filed by the JD against the SAR's decision.

JD's Submission

[15] Learned counsel for the JD contended as follows in support of this appeal:

(a) the court approval binds the JC according to the following cases:

(i) a judgment of the Supreme Court of Victoria, Australia, in *Chief Commissioner of Pay-Roll Tax v. Group Four Industries Pty Ltd* (1984) 8 ACLR 973; and

(ii) the HC's decision in *Wangsini Sdn Bhd v. Grand United Holdings Bhd* [1997] 5 CLJ 664; [1998] 5 MLJ 345;

(b) the guarantee had been executed contemporaneously with the "settlement agreement" (agreed by, among others, the company, JC and JD). As such, the JD's liability to the JC is "part of" the transaction between the JC and the company. Upon the granting of the court approval, the JD's indebtedness to the JC would be affected by the compromise scheme. The JD cited the Court of Appeal case of *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230; [2000] 2 MLJ 267;

(c) the JC had not applied to intervene in the s. 176 CA Suit so as to set aside the court approval. Consequently, the JC is bound by the court approval; and

(d) the exercise of the HC's bankruptcy jurisdiction is equitable and should take into account the court approval. Reliance has been placed on the Singapore Court of Appeal's decision in *Hoban Steven Maurice Dixon & Anor v. Scanlon Graeme John & Ors* [2007] 2 SLR 770.

JC's Contentions

[16] The JC resisted this appeal on the following grounds:

(a) the JD is deemed to have accepted the factual averments in the JC's affidavit by reason of the JD's failure to deny the JC's affidavit. The JC relied on the following cases:

(i) the Court of Appeal's judgment in *Ng Hee Thoong & Anor v. Public Bank Bhd* [2000] 1 CLJ 503; [2000] 2 MLJ 29;

(ii) the Federal Court case of *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64; and

(iii) the Court of Appeal's decision in *Vasanthi Rajamanikam v. Kalaiselvi Perumal* [2012] 9 CLJ 912; [2013] 4 MLJ 589;

(b) the JD should have filed a SIC under r. 18(1) of the Bankruptcy Rules 1969 (BR) to set aside the BN. The JD cited the Federal Court's judgment in *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307; [1995] 2 MLJ 724 (Datuk Ong Kian Seng);

(c) the alleged counterclaim is not valid according to the following cases:

(i) the Federal Court's judgment in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242; [1985] 1 MLJ 157;

(ii) the Federal Court case of *Ratna Ammal v. Tan Chow Soo* [1970] 1 LNS 131; [1971] 1 MLJ 277; and

(iii) the HC's decision in *Re Wong Pong Yap, Ex-Parte Development & Commercial Bank Bhd* [2002] 1 LNS 256; [2002] MLJU 690;

(d) under s. 176 CA, the compromise scheme only bound the company and not the JC. The HC case of *Re David Lim Hong Kee, ex parte Perwira Habib Bank Malaysia Berhad* [1995] 4 CLJ 627; [1995] 4 MLJ 564 had been relied on by the JC. Section 176(10F) and (10G) CA have provided that the compromise scheme does not bind a guarantor of the company such as the JD in this case. The judgment of the High Court in *Textfibre (Selangor) Sdn Bhd & Ors v. Permata Merchant Bank Bhd* [1996] MLJU 175 had been cited in support of this submission by the JC;

(e) even if the first bankruptcy case has been decided on the merits, the following HC cases have decided that the JC is not barred by the doctrine of *res judicata* from applying for the issuance of the BN in this case:

(i) *Malayan Banking Bhd v. Datuk Lim Kheng Kim [2]* [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840; [1992] 2 MLJ 540; and

(ii) *Ghazali Hj Ibrahim v. CIMB Bank Bhd* [2012] 9 MLJ 768; and

(f) This Appeal was a ploy by the JD to delay bankruptcy proceedings against the JD as explained in the HC's judgment in *Re Tunku Maryam Tunku Zainal Abidin, Ex Parte Arab Malaysian Finance Bhd* [2007] 8 CLJ 626; [2007] 8 MLJ 714.

JD Need Not File SIC To Set Aside BN

[17] Rules 18(1), 95(1) and (2) BR provide as follows:

Applications to be made by summons in chambers

rule 18(1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

Application to set aside

rule 95(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

95(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

(emphasis added).

[18] According to r. 95(1) BR, the JD's affidavit "shall operate as an application to set aside" the BN - please see Mohd. Dzaiddin SCJ's (as he then was) judgment in the Supreme Court case of *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 AMR 1285, at 1290. There is therefore no necessity for the JD to file a SIC under r. 18(1) BR to set aside the BN.

[19] I have not overlooked the Federal Court's judgment delivered by Mohd. Dzaiddin FCJ (as he then was) in *Datuk Ong Kian Seng* (which has been cited by the JC's learned counsel). *Datuk Ong Kian Seng*, at p. 729 and 731, concerned a SIC filed under r. 18(1) BR to set aside a CP and not a BN. As such, *Datuk Ong Kian Seng* does not support the JC's contention that the JD must file a SIC under r. 18(1) BR to set aside a BN.

JD's Affidavit Cannot Set Aside BN

[20] Section 3(1)(i) and (2) BA state as follows:

Acts of bankruptcy

3(1) **A debtor commits an act of bankruptcy in each of the following cases**:

…

(i) *if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice*, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, *either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained*:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

…

(2) **A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith** and shall be served in the prescribed manner: **Provided that a bankruptcy notice**:

…

(ii) *shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake*; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

(emphasis added).

[21] Form 7 of the Appendix to BR (Form 7) provides as follows:

No. 7

(Rule 95)

(Title)

AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE

I, ... of ... affirm and say:

1. That I was, on the ... day of ..., served with the notice hereunto annexed (or describe the notice).

That I have satisfied the judgment debt claimed by ... by (state nature of satisfaction).

Or

2. That **I have a counter-claim (or set-off or cross demand) for $ … being a sum equal to (or exceeding) the claim of the said … in respect of (here state grounds of counter-claim)**.

3. **That I could not have set up the said counter-claim (or as the case may be) in the action in which the said judgment was obtained against me**.

(emphasis added).

[22] Rule 95(1) BR and Form 7 should be read together with s. 3(1)(i) BA. This is clear from the Supreme Court's judgment in *Datuk Lim Kheng Kim*, at p. 327 (CLJ); pp. 1289 and 1290 (MLJ), as follows:

We would observe here that the above affidavit, purportedly an affidavit to set aside bankruptcy notice, fails to follow, both in form and substance, Form No 7 of the Rules, which contains the requirements of s 3(1)(i) [BA] pertaining to a debtor to,

"satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained …"

(emphasis added).

[23] I agree with the JC's submission that the term "counterclaim" in s. 3(1)(i) BA and Form 7 has the meaning given by Gill FJ (as he then was) in the Federal Court case of *Ratna Ammal*, at pp. 278, 279 and 280, as follows:

> *The debtor's application to set aside the bankruptcy notice was made on the ground that she had a counterclaim and/or set-off and/or cross-demand against the creditor for an amount over and above the said sum of $20,694.02. …*
>
> …
>
> *These claims were the subject matter of an action in the High Court at Penang, being Civil Suit No. 123 of 1963, filed by the debtor and her son, one Mahalingam Ratnavale, against the creditor.*
>
> *The question which we had to decide was whether or not these claims provided a counterclaim, set-off or cross-demand which equalled or exceeded the amount of the judgment debt. As to what claims are included in the words "counterclaim, set-off or cross-demand", Lord Hanworth M.R. in In re A Bankruptcy Notice [1934] Ch 431* said:
>
> > With regard to the word 'set-off', that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off. *With regard to a counterclaim, that is a creature of the Supreme Court of Judicature Act, 1873. By section 24, sub-section 3, it was provided that the courts should have the power to hear a counterclaim, a matter which could not until that time have been included in the same action. Under that sub-section the defendant is enabled to set up by way of counterclaim a claim which he might have had against the plaintiff, and that is to be heard in the action started by the plaintiff against him, and rules are provided for that purpose*. That sub-section is now section 39 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Act which consolidates all the Supreme Court of Judicature Acts.
> >
> > … If a cross-demand is only to be interpreted as meaning something which could have been introduced into the action by way of counterclaim, it adds nothing to the word 'counterclaim'. 'Cross-demand' seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counterclaim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt.

As Mathew J. said in Hood Barrs v. Cathcart [1895] 1 QB 873, a counterclaim is equivalent to a cross-action, and is instituted as a cross-action; there is the closest analogy between raising a counterclaim and instituting an action. Halsbury's Laws of England, 3rd edition, Vol. 34, paragraphs 669, 670 and 671 at page 395 says:

> When A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A, such that B is to the extent of his cross-claim entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of his claim, then B is said to have to the extent of his cross-claim a right of set-off against A.
>
> *When A has a claim of any kind against B and brings an action to enforce such claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.*
>
> Set-off is distinguishable from counterclaim both in its application and in its effect. In its application set-off is limited to money claims, whereas counterclaim is not so limited. Any claim in respect of which the defendant could bring an independent action against the plaintiff can be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money, but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.

It is to be observed that section 3(1)(i) of our [BA], which is similar to section 1(1)(g) of the English Bankruptcy Act, 1914, requires the debtor to satisfy the court that he has a counterclaim, set-off or cross-demand. It was decided by the Court of Appeal in England in In re GEB, a Debtor [1903] 2 KB 340 that the section means a counterclaim, set-off, or cross-demand which is effective at the time of the hearing of the application to set aside the bankruptcy notice. That case was cited with approval in *In re A Bankruptcy Notice* [1934] Ch 431 in which the facts were as follows. In a pending action in the Chancery Division a debtor claimed a declaration that he was entitled to a charge on the proceeds of certain property in the hands of trustees in priority to the creditor. In a subsequent action in the King's Bench Division brought by the creditor against the debtor in respect of a different transaction the creditor obtained judgment in respect of which he issued a bankruptcy notice. On an application by the debtor under section 1(1)(g), of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside, it was held that the claim in the Chancery action was not a "counterclaim, set-off or cross-demand" within the meaning of the sub-section, and was not therefore a ground for setting aside the bankruptcy notice. Lord Hanworth M.R. said in that case (at page 438):

> *The debtor's claim in the Chancery action does not appear to be in the nature of a counterclaim. It is certainly not a claim which can be at the moment so definitely quantified as to be described as necessarily equalling or exceeding the amount of the judgment debt. It is a claim which may inure to the benefit of the plaintiff, and he may be able ultimately to receive a sum, but, so far*

> *as the position can be taken at the present time, it is difficult to say that it equals or exceeds the amount of the judgment debt.*
>
> …
>
> *... In our view, any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions.*
>
> …
>
> *The learned judge in the court below in stating his reasons for dismissing the debtor's application said in the course of his judgment:*
>
> > *I dismissed the application to set aside the Bankruptcy Notice as I hold that the contention of the appellant that she has a cross-demand, set-off or counterclaim against the respondent exceeding the sum of $20,694.02 failed in that it was not one which is enforceable by her in her own right against the respondent and which further was indeterminate and uncertain.*
>
> *With that reasoning of the learned judge we entirely agreed, and accordingly dismissed the appeal.*
>
> (emphasis added).

[24] The alleged counterclaim relied on the compromise scheme which had court approval. I am of the view that the alleged counterclaim does not constitute a "counterclaim" within the meaning of s. 3(1)(i) BA and Form 7 as explained in *Ratna Ammal*. This is because the JD has no claim against the JC which "must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions".

[25] If the alleged counterclaim is not a "counterclaim" under s. 3(1)(i) BA and Form 7, the JD's affidavit cannot set aside the BN. The Supreme Court decided as follows in *Datuk Lim Kheng Kim*, at pp. 327-328 (CLJ); p. 1290 (MLJ):

> *We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross-demand etc. against the respondent, which he is required to depose under s. 3(1)(i) [BA] and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) [BA], and the case should have been treated as if no affidavit under Rule 95 had in fact been filed.*
>
> (emphasis added).

[26] As the alleged counterclaim is not recognised by s. 3(1)(i) BA and Form 7, I agree with the JC's submission that on this ground alone, This Appeal should be dismissed with costs.

[27] There is another ground why this appeal should be dismissed.

Paragraph 3 of the JD's affidavit admitted that the JD had been served with the BN on 19 September 2014. The BN gave the JD a time period of seven days to pay the judgment sum together with interest and costs (seven-day period). The JD had not adduced any evidence that the JD had given any notice to the JC within the seven day period that the JD disputes the validity of the BN on the ground of the alleged counterclaim or on any other ground. Proviso (ii) to s. 3(2) BA provides that if the JD does not give notice to the JC within the seven-day period that the JD disputes the validity of the BN, the BN shall not be invalidated. I rely on the Federal Court's judgment in *Datuk Ong Kian Seng*, at p. 315 (CLJ); p. 733 (MLJ), as follows:

> *Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to s. 3(2) [BA], it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein*.
>
> (emphasis added).

First Bankruptcy Order Does Not Bar Issuance Of BN In This Case

[28] It is trite law that since the JD did not deny the JC's affidavit that the First Bankruptcy Order was due to a defective CP wherein the merits of the JC's bankruptcy proceedings had not been decided, the JD is deemed to have accepted such allegations of fact - please see the Federal Court's judgment delivered by Chong Siew Fai CJ (Sabah & Sarawak) in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; [1996] 3 MLJ 533, at 541.

[29] Even if this court assumes that the merits of the first bankruptcy case have been decided, the First Bankruptcy Order does not give rise to the application of the *res judicata* doctrine to bar the issuance of BN in this case. I rely on Abdul Hamid JC's (as he then was) decision in the HC case of *Malayan Banking Bhd v. Datuk Lim Kheng Kim [1]* [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826, at pp. 834 & 835; [1992] 2 MLJ 540, at p. 555, as follows:

> *Res judicata*
>
> *Learned counsel for the judgment debtor argued that the petitioning creditor was estopped from commencing the present bankruptcy proceedings against the judgment debtor because earlier on a receiving and adjudication order had been made by the High Court but set aside by the Supreme Court. However, he conceded that the order of the High Court was set aside on the sole ground that the bankruptcy notice was defective since the amount of interest was not quantified*.
>
> He cited the following authorities: *Malayan United Finance Ltd v. Noormurni Sdn Bhd & Anor; Reebok International Ltd v. Royal Corporation; Chua Wee Seng v. Fazal Mohamed; Government of Malaysia v. Dato' Chong Kok Lim; and Tractors (M) Bhd v. Charles Au Yong*.

Clearly these authorities are not on point as none of them is a bankruptcy case. I asked the learned counsel if he could show me an authority which supported his contention. He admitted he could not. I am of the view that the decision of the Supreme Court on the earlier order made by Mohamed Dzaiddin J in the earlier proceedings, on the ground that it (the Supreme Court) did, does not operate as res judicata against the petitioning creditor from issuing a fresh bankruptcy notice. The matter is res judicata as regards the earlier notice, not a fresh notice - see Re Vitoria, ex p Vitoria. This ground fails.

(emphasis added).

[30] The above HC's decision has been affirmed by the Supreme Court on appeal - please see *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 AMR 1285, at 1288.

Can Compromise Scheme Extinguish Debts Of Third Party Guarantor?

Section 176 CA

[31] Section 176 CA provides as follows:

Power to compromise with creditors and members

176(1) *Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs*.

(2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned from time to time if the resolution for adjournment is approved by a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting.

(3) *If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company*.

(4) *The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just*.

(5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

A (6) Subject to subsection (7), a copy of every order made under subsection (3) shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

B (7) The Court may, by order, exempt a company from compliance with the requirements of subsection (6) or determine the period during which the company shall so comply.

(8) Where any such compromise or arrangement (whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies) has been proposed, the directors of the company shall:

C

(a) if a meeting of the members of the company by resolution so directs, instruct such accountants or advocates or both as are named in the resolution to report on the proposals and forward their report to the directors as soon as may be; and

D

(b) make the report available at the registered office of the company for inspection by the shareholders and creditors of the company at least seven days before the date of any meeting ordered by the Court to be summoned as provided in subsection (1).

E (9) Every company which makes default in complying with subsection (6) or (8) and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit.

Power of Court to restrain proceedings

F (10) Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or

G proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

(10A) The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if:

H

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

I

(b) the restraining order is necessary to enable the company and its creditors to formalize the scheme of compromise or arrangement for the approval of the creditors or members pursuant to subsection (1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

(10B) The person approved or appointed by the Court to act as a director of the company under subsection (10A) shall have a right of access at all reasonable times to the accounting and other records (including registers) of the company, and is entitled to require from any officer of the company such information and explanation as he may require for the purposes of his duty.

(10C) Any disposition of the property of the company, including things in action and any acquisition of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the Court shall, unless the Court otherwise orders, be void.

(10D) Where a company disposes or acquires any property, other than in the ordinary course of its business, without leave of the Court, every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or one million ringgit or both.

(10E) Where an order is made under subsection (10), every company in relation to which the order is made shall, within seven days:

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in a daily newspaper circulating generally throughout Malaysia

and every company which makes default in complying with this subsection and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: One hundred thousand ringgit.

(10F) **An order made by the Court under subsection (10) shall not have the effect of restraining further proceedings in any action or proceeding against any person other than the company that had applied for the restraining order**.

(10G) **For the purpose of subsection (10F), the term "any person" includes a guarantor of the company**.

Interpretation

(11) In this section:

"arrangement" includes a reorganization of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;

"company" means any corporation or society liable to be wound up under this Act.

(emphasis added).

Section 176(10F) And (10G) CA Do Not Apply In This Case

[32] Before I discuss the novel issue of whether the compromise scheme, with the court approval, can apply to extinguish the judgment sum, I cannot accede to the submission of learned counsel for JC that s. 176(10F) and (10G) CA have provided that the Compromise Scheme does not bind a guarantor such as the JD. It is clear from the wording of s. 176(10F) and (10G) CA that the HC hearing a s. 176 CA Suit cannot restrain proceedings against the company's guarantors. Section 176(10F) and (10G) CA have no effect on the novel question in this case.

Cases Cited By SAR, JC And JD

[33] *Dataran Rentas Sdn Bhd* has been cited by the learned SAR in support of the SAR's Decision. With respect, *Dataran Rentas Sdn Bhd* did not involve s 176 CA.

[34] All the cases relied on by the JD, with respect, did not concern the novel issue which arises in this appeal. Similarly, the novel question in this case did not arise in the cases cited by the JC's learned counsel, except for *Textfibre (Selangor) Sdn Bhd*.

[35] In the HC case of *Textfibre (Selangor) Sdn Bhd* [1996] MLJU 175, the petitioner company applied for court approval for a scheme of arrangement which had been previously amended twice and approved twice by the HC (further amended scheme). Syed Ahmad Idid J granted approval for the further amended scheme and decided as follows:

> *The other ground for the Respondent's opposition to the further amended scheme is that Clause 23 of the further amended scheme is ultra vires section 176 [CA]. The Respondent contended that the scheme of arrangement could not bind the guarantors since it involves only the petitioners and the creditors. For convenience Clause 23 is reproduced as follows:*
>
> > *All legal proceedings, if any, commenced and filed in any court against the Texfibre group or any guarantor of any facilities granted by the Creditors or any of them shall upon this Further Amended Scheme becoming effective be stayed on terms that each party shall bear its own costs*. The Creditors shall be prohibited from commencing any suits or taking any actions including actions by appointment of receivers and/or managers or repossession of property, moveable or immoveable, against the Texfibre Group in relation to the moratorium on and waivers of interest, defaults or in deferments of payment and rescheduling of debts stated herein including actions on personal or corporate guarantees.
>
> *Learned counsel for the Respondent submitted that whilst the Respondent does not object to the whole of the effect of Clause 23 the Respondent objects to that part of Clause 23 which prohibits creditors from commencing any suits on personal or corporate guarantee. This is understandably so since the Respondent had in fact commenced proceedings against the guarantors to the banking facilities granted to Texfibre vide civil suit no. D5-22-715-95 at High Court Malaya in Kuala Lumpur. If the further amended scheme is approved the proceeding would have to be stayed.*

It is settled law that a scheme of arrangement between a debtor and its creditors when sanctioned by the court becomes a statutory scheme. (See in *Re Garner's Motors Ltd* [1937] 1 CH 514). **It is also settled law that a scheme of arrangement sanctioned by the court will not release the guarantor unless the terms of the guarantee expressly states otherwise**. (See *Punjab National Bank Ltd v. Bikram Cotton Mills & Anor* [1970] 2 S.C.R. 462 at p. 469).

…

In Hill v. Anderson Meat Industries Ltd [1971] 1 N.S.W.L.R. 868, the question to be determined was whether Anderson Meat Industries Ltd was bound as guarantor to pay to Mrs. Hill the amount agreed to be paid to her by Anderson Meat Packing Co Pty and guaranteed by Anderson Meat Industries Ltd, upon a scheme of arrangement taking effect, whereby Mrs. Hill was to be paid sixty cents in the dollar of the debt due. Street J held that Anderson Meat Industries Ltd was bound as a guarantor to pay to Mrs. Hill to the extent that the said moneys have not been or may not be paid to her by or on account of Anderson Meat Packing Co Pty Ltd. The decision of Street J was upheld by the Court of Appeal. (See [1972] 2 N.S.W.L.R. 704).

It is thus clear that the liability of a guarantor will not be affected upon a scheme of arrangement taking place, but to the extent of that part of the debt due which could not be recovered from the borrower, because of the scheme of arrangement.

In this case by converting the unsecured debt of the Respondent into shares of Texfibre, the debt of the Respondent has been discharged in full satisfaction and there is no balance due for the guarantors to be liable. It is also my view that Clause 23 does not purport to bind the guarantors but merely to spell out the rights and obligations of the petitioners and the creditors. Based on this fact and based on the above-cited authorities I would therefore hold that the second ground of opposition fails.

(emphasis added).

[36] The question of whether a compromise scheme had extinguished the debts of a third party guarantor of the company, did arise in *Textfibre (Selangor) Sdn Bhd*. I have quoted in extenso the HC's judgment in *Textfibre (Selangor) Sdn Bhd* but with respect, such a judgment seems ambivalent to me.

Singapore Companies Act [CA (Singapore)]

[37] Section 210 CA (Singapore) reads as follows:

Power to compromise with creditors, members and holders of units of shares

210(1) Where a compromise or an arrangement is proposed between:

(a) a company and its creditors or any class of them;

(b) a company and its members or any class of them; or

(c) a company and holders of units of shares of the company or any class of them,

A the Court may, on the application in a summary way of any person referred to in subsection (2), order a meeting of the creditors, the members of the company, the holders of units of shares of the company, or a class of such persons, to be summoned in such manner as the Court directs.

B (2) The persons referred to in subsection (1) are:

(a) in the case of a company being wound up, the liquidator; and

(b) in any other case:

(i) the company; or

C (ii) any creditor, member or holder of units of shares of the company.

(3) A meeting held pursuant to an order made under subsection (1) may be adjourned from time to time if the resolution for the adjournment is approved by a majority in number representing three-fourths in value of:

D (a) the creditors or class of creditors;

(b) the members or class of members; or

(c) the holders of units of shares or class of holders of units of shares,

present and voting either in person or by proxy at the meeting.

E (3AA) **If the conditions set out in subsection (3AB) are satisfied, a compromise or an arrangement shall be binding**:

(a) in the case of a company in the course of being wound up, on the liquidator and contributories of the company; or

F (b) **in the case of any other company**, on the company and on all:

(i) **the creditors or class of creditors**;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares,

G as the case may be.

(3AB) The conditions referred to in subsection (3AA) are as follows:

(a) unless the Court orders otherwise, a majority in number of:

H (i) the creditors or class of creditors;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares,

I present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to the compromise or arrangement;

(b) the majority in number referred to, or such number as the Court may order, under paragraph (a) represents three-fourths in value of:

(i) the creditors or class of creditors;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares,

present and voting either in person or by proxy at the meeting or the adjourned meeting, as the case may be; and

(c) the compromise or arrangement is approved by order of the Court.

(3A) Where the company is a banking corporation or licensed insurer, as the case may be, the Monetary Authority of Singapore established under the Monetary Authority of Singapore Act (Cap. 186) shall have the same powers and rights as a creditor of the company under the Companies Act including the right to appear and be heard before a Court in any proceedings under this section, but shall not have the right to vote at any meeting summoned under this section.

(4) **Subject to subsection (4A), the Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.**

(4A) The Court shall not approve any compromise or arrangement which has been proposed for the purposes of or in connection with any scheme referred to in section 212(1) under which the whole or any part of the undertaking or the property of a banking corporation incorporated in Singapore or licensed insurer incorporated in Singapore is to be transferred, unless the Minister charged with the responsibility for banking or insurance matters, as the case may be, has consented to the compromise or arrangement or has certified that his consent is not required.

(5) An order under subsection (3AB)(c) shall have no effect until a copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

(6) Subject to subsection (7), a copy of every order made under subsection (3AB)(c) shall be annexed to every copy of the constitution of the company issued after the order has been made.

(7) The Court may, by order, exempt a company from compliance with the requirements of subsection (6) or determine the period during which the company shall so comply.

(8) Where any such compromise or arrangement (whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any 2 or more companies) has been proposed, the directors of the company shall:

(a) if a meeting of the members of the company by resolution so directs, instruct such accountants or solicitors or both as are named in the resolution to report on the proposals and forward their report or reports to the directors as soon as possible; and

A (b) make such report or reports available at the registered office of the company for inspection by the shareholders, creditors and holders of units of shares of the company at least 7 days before the date of any meeting ordered by the Court to be summoned as provided in subsection (1).

B (9) Every company which makes default in complying with subsection (6) or (8) and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000.

(emphasis added).

C **[38]** Section 210(1), (3AA) and (4) CA (Singapore) are similar (not identical) to our s. 176(1), (3) and (4) CA. In view of the similarities between s. 210(1), (3AA) and (4) CA (Singapore) with our s. 176(1), (3) and (4) CA, Singapore's cases on s. 210 CA (Singapore) are persuasive.

D **[39]** In *Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd* [2001] 4 SLR 35, at paras. 8, 9, 13-16, 21-28, 32, 33 and 36,Yong Pung How CJ delivered the following judgment of the Singapore's Court of Appeal (the apex court in Singapore);

8. The first objection raises the question of fairness of the scheme to Daewoo, which, however, was not canvassed before the court below. It
E was not suggested that the scheme was unfair to Daewoo in any way. *True it is that cl 4.3.1 of the scheme requires Daewoo to release the guarantor, Mr Lim, from his liability under the guarantee in respect of CEL Tractors' debts owed to them.* …

9. *The second objection is this. The scheme expressly incorporates provisions requiring*
F *the creditors to discharge and release their securities and further to release the guarantors from their liabilities under the guarantees for the debts and liabilities of CEL Tractors. It was argued that a scheme of arrangement under s 210 of the Companies Act could not encompass such provisions on the ground that a scheme under that section bound only the company and the creditors and therefore could only discharge or affect the debts and liabilities of the company and not the liability of*
G *a third party, such as a guarantor, for the same debts and liabilities of the company.*

…

Effect of a statutory scheme of arrangement

13. *We turn first to the leading case of Hill v. Anderson Meat Industries [1971] 1*
H *NSWLR 868. There, a company, Anderson Meat Industries Ltd ("Anderson") and its five subsidiaries were in financial difficulties, and schemes of arrangement were made between the subsidiaries and their creditors respectively under s. 181(1) of the Companies Act 1961 (the equivalent of our s. 210) whereby, among other things, in consideration of a payment to the creditors amounting to 60[cent] to the dollar the debts owed to the creditors would be extinguished and discharged. One of the*
I *subsidiaries, Anderson Meat Packing Co Pty Ld, was indebted to a Mrs Hill, and the debt was guaranteed by Anderson. Mrs Hill voted against the scheme. There was no provision in the schemes which discharged any guarantee given for the debts and liabilities of the subsidiaries. The schemes were approved by the requisite majority and by the court. Mrs Hill later sued Anderson for the amount due under the guarantee,*

contending that Anderson remained liable to her under the guarantee, notwithstanding the schemes. At first instance, Street J, having considered the distinction between a debt discharged by contract and one discharged by operation of law, said at p 875:

> Essentially the point for present determination turns upon whether there is a valid distinction between a composition within the bankruptcy legislation or a scheme within a current winding up on the one hand, and a scheme outside a winding up upon the other. In my judgment the point of distinction, although it exists, is too fine to be recognized. Where, as here, a scheme of arrangement is propounded in connection with the affairs of an insolvent company, then the court's approval under s 181 will give to the scheme a statutory operation upon the relationship between the debtor and its creditors, and so far as concerns a guarantor, in the absence of any special provision in the guarantee agreement, the guarantor's liability subsists in exactly the same manner as if the scheme had been formally approved within a current winding up.

The learned judge therefore held that the liability of Anderson under the guarantee was not discharged. On appeal, his decision was affirmed: [1972] 2 NSWLR 704. Jacobs P said at p 706:

> What has been submitted to this Court is that by the terms of the scheme, particularly cl. 3 which I have set out, the debt owing by the packing company to Mrs Hill is extinguished. Next, because a guarantee is an accessory obligation, upon the extinguishment of the principal indebtedness the guarantee goes also, as a result of the fact that there is no principal debt to which the accessory liability can attach. It is conceded, as of course it must be, that these principles do not apply where the obligation is extinguished by operation of law, as for instance in the case of bankruptcy or the winding up of a company, but it is submitted that the obligation in the present case is not extinguished by operation of law but rather is extinguished by the terms of the scheme which impose not only upon those creditors who assent to it, but upon all creditors, the effect of the document which constitutes the scheme. In this way it is submitted that the cases which are referred to by Street J are distinguishable. The argument is not substantially different from that which was propounded before the judge at first instance. He rejected it upon the ground that there is in fact a discharge of the obligation by operation of the law. I agree with this conclusion. Mrs Hill was never a party to the release of the obligation. The release came through the operation of a law which bound her as though she were a party. This seems to me in principle to be within that line of authority which so clearly establishes that the extinguishment of a principal obligation, when it is brought about by operation of law, does not result in a discharge of the surety.

14. *The decision in Hill (supra) was followed in Australia. In particular, in Gan v. Sanders* (1994) 15 ACSR 298, the Supreme Court of Victoria held that the deed of arrangement entered into between Luxville Pte Ltd (the debtor company) and its creditors did not discharge the third party surety.

A …

15. *The New Zealand courts have likewise followed suit. In the High Court case of Re Southern World Airlines* [1993] 1 NZLR 597, a scheme of arrangement was designed to resuscitate Southern World Airlines Ltd with a 'buy-out' by a new operator. The scheme, among other things, expressly provided
B for the assignment of the debts of the company to a nominee of the new operator and further provided that thereafter the creditors would have no further claim against the company. Upon the application to court for sanction of the scheme, two creditors objected to the scheme. One of the objections made was that one of the two creditors held a guarantee from another party for part of the debt owed by the company and that the
C scheme might discharge the guarantee. However, there was no term in the scheme which sought to extinguish the rights of the creditor under the guarantee. Williams J held that the scheme did not extinguish third party liabilities. He said at p 605:

> In the present case the scheme of arrangement required the
D creditors in consideration of their receipt of certain money from the scheme manager to assign the amount of their debts and the creditors "shall not henceforth assert against the company any claim action or proceeding arising from any indebtedness matter instrument or thing existing prior to the commencement date. It was submitted that what would happen to the creditors' debts
E under this scheme just as in the other forms of scheme, occurred by operation of law and not by the voluntary act of the creditor so there could not be a discharge of the guarantor ... In summary the applicant submitted that it was not the form of the scheme which mattered in terms of whether the guarantee was discharged but rather whether the scheme of arrangement occurred by
F operation of law. Fine distinctions between schemes were immaterial -- the key issue was the principle expounded in *Hill v. Anderson Meat* which was of general application. I uphold those contentions.

16. *Similar pronouncement was made in Buttle v. Allan as Official Liquidator of*
G *Buttle & Co Sharebrokers (in liquidation)* [1994] 1 NZLR 396 at 404, where the New Zealand Court of Appeal said:

> *We accept Hill's case as being a correct statement of the law in New Zealand as well as in Australia. The sanctioning of a scheme of arrangement does not discharge the original debt for all purposes any more than does the adjudication in bankruptcy of the debtor or the winding up of a debtor*
H *company. It does not affect the liability of a guarantor, even though that liability is expressed in the form of a guarantee of the original debt.*

…

Settled law

I 21. *On the basis of these authorities, it is settled law that a scheme of arrangement or compromise made between a company and its creditors in relation to its debts and liabilities, approved by the requisite majority of the creditors and by the court, affects*

only the rights of the creditors against the company, and does not affect the rights of the creditors against a third party, such as a guarantor, for the same debts and liabilities of the company. Consequently, where such scheme discharges either in whole or in part the debts owed by the company to its creditors, it does not operate as a discharge of the liability of the guarantor for the same debts or liabilities of the company. However, in all these cases, the schemes in question did not contain any express term requiring the creditors to extinguish or discharge the liability of a third party, such as a guarantor, for the debts or liabilities of the company concerned. In the instant case, the scheme contains an express provision to the effect that upon the company, CEL Tractors, observing and performing their obligations under the scheme, the creditors will release the guarantors from their obligations under the respective guarantees. In this respect, the instant case is distinguishable from these cases, which therefore do not really assist in the resolution of the issue before us.

Issues

22 *It seems to us that in this case there are really two issues for determination. The first is whether it is permissible to incorporate in a scheme of arrangement or compromise under s 210 of the Companies Act, as was incorporated in the present scheme under consideration, a term to the effect that, upon the company performing its obligations as regards payments and other things vis-a-vis the creditors under the scheme, the creditors will release the guarantors from their obligations under the respective guarantee. The second is whether such a term is valid and effectual for the purpose*.

23 *On the first question, we can see no reason in principle why a scheme of arrangement or compromise under s. 210 of the Companies Act cannot incorporate such a term. No cases have been cited to us to say that such a term cannot be embodied in a scheme. After all, a scheme of arrangement or compromise proposed by a company to be made with its creditors or a class of creditors under s. 210 of the Companies Act is no more than a proposal to vary or modify its obligations in relation to its debts and liabilities owed to its creditors or a class of creditors on certain terms and conditions. In seeking so to vary or modify its obligations, there is nothing to prevent the company from proposing, as part of a wider scheme, inter alia, a term to the effect that, in consideration of what the company has provided under the scheme, the creditors will, upon implementation of the scheme, discharge not only the debts and liabilities of the company but also the liabilities of the guarantors for the same debts and liabilities of the company. Whether such a term is agreeable to its creditors is a different matter; it all depends on the circumstances of the case and what the company has to offer under the scheme as a quid pro quo for the discharge of these liabilities*.

24 *It is trite law that, where a scheme of arrangement or compromise (containing such a term) is approved by all the creditors of the company, it is binding on the company as well as its creditors. In such a case, there is no need on the part of the company to invoke s. 210 of the Companies Act. The scheme is wholly a contractual scheme. Where, as is usually the case, it is not practical or practicable to secure the unanimous agreement of all the creditors, s. 210 is invoked. And when s. 210 is invoked, and the scheme is approved by the requisite majority of the creditors and the court, the scheme becomes binding on all the creditors or the class of creditors (as the case may be). That is provided in s 210(3) of the Act. The binding effect of the scheme is given by the court order approving the scheme. As Street J said in Re Norfolk Island and Byron Bay Whaling Co (1969) 90 WN (Pt 1) (NSW) 351*

at 354 with reference to s. 181 of the Companies Act 1961 of the State of New South Wales (which is the equivalent of our s 210), the section is intended to provide a machinery (1) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby, and (2) for preventing, in appropriate circumstances, a minority of class members frustrating a beneficial scheme.

25 *We now turn to another aspect of a scheme of arrangement or compromise under s. 210 of the Companies Act. It is permissible in law to incorporate in a scheme an involvement or participation by an outsider, that is, a party not a party to the scheme. Indeed, quite often, a scheme does provide for such involvement or participation by an outsider. Quite often, a scheme as devised provides for a 'buy out' or an injection of cash by an outsider and it has been held that such a scheme falls within the purview of that section. In Re A and C Constructions [1970] SASR 565, the Supreme Court of South Australia held that the court would not refuse to approve a scheme under s 181 of the Companies Act 1962-1968 (which was the equivalent of our s. 210) merely because (1) the scheme provided for an outsider to purchase the company structure in order to obtain a tax benefit, and (2) that a person other than the company, its members and creditors was a party to the scheme. Bray CJ said* at p 568:

> An order of the court under s. 181(2) is necessary so that a dissentient, non-voting or absentee minority of creditors or members may be bound by the scheme. Otherwise everything could be done contractually. The order of the court in the terms of the sub-section is made binding only on the creditors or members, or particular class of creditors or members, and on the company, or, if the company is being wound up, also on its liquidator and contributories. *It is, however, in my view, a fallacy to assume that therefore no other person can be a party to the scheme. In my view, so long as the scheme can properly be described as a compromise or arrangement between a company and its members or creditors or any class of them within the meaning of s. 181(1), it is immaterial that other persons are parties to it, but its binding force on such other parties will derive from the scheme as a contract, or from some other contract, and not from the order of the court*.

A similar pronouncement was made by another member of the court, Wells J who said at p. 574:

> *A scheme that includes provisions that may without doubt be said to constitute a compromise or arrangement of the kind described by s 181 does not cease to fall within the jurisdiction conferred upon the court by that section by reason only of the inclusion within the scheme of an outsider - a person not the company, a member or a creditor - but the extent to which the stranger will be bound by the scheme will depend on the inherent contractual validity of the scheme with respect to the stranger, and not upon any order of the court under s 181 signifying its approval of the scheme.*

26 *In Re Glendale Land Development (in liquidation) (1982) 7 ACLR 171, a scheme of arrangement proposed by the company under s. 315(1) of the Companies (NSW) Code involved a third party in the implementation of the scheme. On the application by the company for directions to convene a meeting of creditors, McLelland J of the Supreme Court of New South Wales considered whether the*

scheme could contain such a provision involving an 'outsider'. He held that an arrangement between a company and its relevant creditors was not outside the scope of s. 315 merely because it was part of a wider scheme involving an outsider or an outsider was a necessary party to the implementation of the scheme. The learned judge said at p. 173:

> *[A]n arrangement between a company and its relevant creditors or members is not outside the scope of such a provision as s 315 merely because it is part of a wider scheme involving outsiders, or an outsider is a necessary party to its implementation. This is in any event made abundantly clear by the provisions of s. 317.*

In coming to this conclusion, the learned judge followed the decision in Re A and C Constructions (supra) and adopted those parts of the judgments of Bray CJ and Wells J quoted above.

27 *The scheme before us involves also third parties but in a passive way. Under cl 4.3 of the scheme, the creditors of CEL Tractors are required, upon CEL Tractors performing their obligations under the scheme, to release the guarantors from the obligations to pay the debts and liabilities of the company under the respective guarantees. In our judgment, there is no reason why the scheme may not contain such a provision.*

28 *We now turn to the second question, which is whether such a term is valid and effectual, bearing in mind that the guarantors are not a party to the scheme. …*

…

32 *True it is that a scheme of arrangement or compromise made between a company and its creditors under s. 210 of the Companies Act binds only the company and the creditors. The guarantors of the company's debts and liabilities are not a party to the scheme, and hence as between the creditors and the guarantors of the debts and liabilities of the company, the scheme of arrangement by itself, of course, does not affect directly the rights and obligations of these parties under the guarantees. Consequently, as and when the scheme is approved by the requisite majority of the creditors and by the court under s. 210, as between the creditors and the guarantors of the company, the rights and obligations of the parties under the guarantees remain unaffected by the scheme. On the other hand, as the scheme is binding on the company and its creditors, there is no reason in principle why the company cannot in principle enforce the terms of the scheme as against the creditors. It must be borne in mind that the scheme contains reciprocal rights and obligations of the company and the creditors, and once the company has observed and performed all its obligations under the scheme, the creditors likewise must observe and perform their obligations thereunder, and if they fail or refuse to do so, the company is entitled to take proceedings to enforce their obligations under the scheme.*

…

33 *It follows therefore that in this case, if CEL Tractors duly perform their obligations under the scheme vis-a-vis the creditors, the latter must likewise perform their obligations thereunder, and if they refuse or fail to do so, eg if they take legal proceedings to enforce the guarantees, CEL Tractors are entitled to seek equitable reliefs in the form of an injunction and specific performance against the creditors*

A *concerned, because if the creditors seek to enforce the guarantees, the guarantors will inevitably seek to have a recourse against CEL Tractors for an indemnity. Such a position would entirely negate the provisions of cl 4.3 of the scheme.*

…

B 36 Generally speaking, in approving a scheme under s. 210 of the Act, the duty of the court is to consider whether the statutory provisions have been complied with, whether the scheme is fair and reasonable to the creditors as a whole, whether the company and the majority creditors are acting *bona fide*, and whether the minority is being coerced to promote the interest of the majority: see *Re English, Scottish, and Australian Chartered*

C *Bank* [1893] 3 Ch 385, 408; *Re Dorman, Long & Co* [1934] Ch 635. In our opinion, no question of unfairness, discrimination or absence of *bona fides* arises in this case. There is no reason why the scheme should not be approved. The judge below approved it. We would do so likewise.

(emphasis added).

D **[40]** My understanding of *Daewoo Singapore Pte Ltd* is as follows:

(a) if a scheme of compromise or arrangement is proposed between a company and its shareholders and/or specified creditors (scheme), the scheme may include extinguishment or settlement of debts owed by third parties to the company's creditors (third party arrangement);

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(b) if a scheme does not expressly include a third party arrangement, the third party arrangement cannot be enforced in any manner by the company and the third party in question, even if the scheme is approved by the company's creditors and HC; and

F (c) if a third party arrangement is expressly provided in the scheme:

(i) the third party arrangement may be enforced as a "statutory contract" between the company and the relevant creditor if the following conditions are fulfilled:

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(1) the scheme is approved by the company's creditors and HC (approved scheme); and

(2) the company fulfils all the terms and conditions of the approved scheme; and

(ii) the third party arrangement may be enforced as a binding statutory

H contract between the company and creditor in question. It is immaterial that the creditor in question has voted unsuccessfully against the scheme which has express provided for the third party arrangement.

I The third party arrangement cannot be enforced under s. 210 CA (Singapore). Nor can the third party enforce the third party arrangement directly against the creditor.

Approved Scheme Which Has Third Party Arrangement, May Be Enforced By Company Against Creditor

[41] I am of the respectful view that the decision and reasoning in *Daewoo Singapore Pte Ltd* are applicable in Malaysia. If all the conditions of an approved scheme (which has expressly provided for a third party arrangement) are fulfilled by the company in question, the company may enforce the Third Party Arrangement against the creditor in question as a statutory contract.

Compromise Scheme Cannot Be Enforced By JD Against JC

[42] Based on *Daewoo Singapore Pte Ltd*, the JD cannot enforce the compromise scheme against the JC. My reasons are as follows:

(a) no evidence had been adduced by the JD that the compromise scheme had expressly included a provision for the JD's judgment sum to be extinguished. In fact, the JD had even failed to exhibit the compromise scheme in the JD's affidavit;

(b) there is no evidence that after the compromise scheme has been approved by the creditors and HC, the company has fulfilled all the terms and conditions of the approved compromise scheme; and

(c) even if compromise scheme has expressly provided for the extinguishment of the judgment sum and assuming the company has satisfied all the terms and conditions of the approved compromise scheme, only the company (not the JD) can enforce the approved compromise scheme against the JC as a statutory contract.

Court's Decision

[43] In view of the above reasons, this court is constrained to dismiss this appeal with costs.